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OFFICE OF THE SECRETARY

December 18, 2000

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

Dear Secretary Salas:

In the matter of MM Docket No. 00-167, Children's Television Obligations of Digital Television Broadcasters, enclosed are four copies of ANA and AAAA comments on this matter.

Sincerely,

Daniel L. Jaffe
Executive Vice President, ANA

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In the Matter of:
Children's Television Obligations of Digital Television Broadcasters
MM Docket No. 00-167

Dear Secretary Salas:

The Association of National Advertisers (ANA) and the American Association of Advertising Agencies (AAAA) submit the following comments on the Commission's Notice of Proposed Rulemaking in the above-captioned matter.

While the Notice raises a number of important issues regarding the obligations of digital television broadcasters to serve children, we are most concerned about three areas: (1) the discussion about how the Commission's children's advertising limits and policies will apply to DTV broadcasters (sections 29-32); (2) the proposal to revise the definition of "commercial matter" for purposes of the commercial time limits (sections 33-34); and (3) the discussion about program promotions that "may be unsuitable for children to watch" (sections 35-37).

These issues raise serious First Amendment and policy concerns. At this early stage of the transition to digital television, we believe it would be premature for the FCC to adopt rigid rules for this emerging technology. In fact, given the financial challenges in developing and producing quality children's programming, new regulatory burdens at this point may actually be counterproductive, both for digital television and children's programming.

ANA is the advertising industry's oldest trade association and the only organization dedicated exclusively to serving the interests of companies that advertise nationally and regionally. The Association's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 8,000 separate advertising entities, these companies market a broad array of products and services to consumers and other businesses. Many of our member companies market various products and services to children.

AAAA, founded in 1917, is the national trade association representing the American advertising agency business. Its more than 500 members, comprised of virtually all of the large, multi-national agencies and hundreds of small and mid-sized agencies, maintain 13,000 offices throughout the country. Together, AAAA member agencies represent about 75 percent of all national, regional and local advertising placed by agencies in the United States.

Commercial Limits

With regard to the application of existing commercial policies to DTV, we strongly agree with the sentiments of Commissioner Powell: "It seems to me premature to attempt to fix public interest obligations to a service that has yet to blossom."

No one knows precisely how digital television will evolve and develop in the marketplace. While trying to anticipate future issues is a worthwhile endeavor, it could be counterproductive for the FCC to impose rigid rules now on this nascent technology. Until we know more facts about how these new technologies will actually work, imposing rigid rules now based on hypotheticals and assumptions could actually harm both digital television and children's programming. The Commission should not aim at imaginary or hypothetical targets, as it is almost certain to miss its regulatory goals, while potentially creating real regulatory damage.

ANA and AAAA strongly support the conclusion of Commissioner Furchtgott-Roth: "The increased burdens posited in the Notice are both ill-timed and technologically misdirected. We are in a critical phase of the transition from analog to digital broadcasting. There are already substantial and costly impediments to the transition – and our ability to achieve the targeted 2006 transition date is by no means certain. . . In addition, the ability of digital broadcasters to supply 4 or perhaps 6 over the air signals will greatly enhance the variety of programming available. Thus, multicasting is likely to allow for the provision of more niche programming, such as those shows targeted to children. To the extent that any changes are warranted, it seems that multicasting would actually argue in favor of reducing these regulatory obligations, not increasing them."

We believe Commissioner Furchtgott-Roth's conclusions are correct. Even if they prove to be wrong in the future, there will be plenty of time for the FCC to act to respond to real, as opposed to hypothetical, risks. There is no reason for the FCC to write all of the rules of the road now while the digital broadcast highway is still being built and before we know precisely how it will work.

For example, we strongly oppose the proposal of the Center for Media Education (CME) that the Commission prohibit all direct links to commercial websites during children's programming. This capability is not currently available and it would be premature to impose such a prohibition before we know more about the technical inter-relationship between digital television and cyberspace.

In today's technology, there are numerous steps or clicks of the mouse that a child takes when surfing the Internet. We assume that any link between a children's television program and a commercial website would require steps or acts by the child that would serve as a bumper, reminding him that he is moving from one media to another and one message to another. If the simple phrase "and now a word from our sponsor" is sufficient in the television world to warn children that a commercial is coming, we are confident that a similar type of bumper or warning can be developed for a direct link to a commercial website. In any event, it would be inappropriate for the FCC to adopt a per se rule banning all hotlinks between a television program and a commercial website, at this early stage of the digital transition. Clearly, these types of rules should only be imposed in those instances where a child is likely to be confused or misled in the absence of the rules.

Further, we are confident that the policy issues surrounding any link between a children's television program and a commercial website can be resolved through application of the industry's current self-regulatory program for children's marketing.

The advertising community always has recognized that children are not miniature adults and deserve protections geared toward their special needs. In 1974, the National Advertising Review Council (NARC) established the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus (CBBB) as the industry's self-regulatory body that promotes responsible children's marketing practices.

NARC is a strategic alliance of the advertising industry and the CBBB. Its Board of Directors is led by the Presidents of the CBBB, ANA, the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), The NARC Board sets policy for CARU's self-regulatory program, which is administered by CBBB and is funded directly by members of the children's advertising industry, including many ANA and AAAA member companies.

Children's Advertising Guidelines have been in existence since 1972, when they were first published by ANA. The CARU Guidelines have been revised several times to meet changes in the marketplace. The current Guidelines specifically address marketing and information practices in interactive electronic media. Those guidelines have had real impact in the marketplace as CARU has worked with many website operators to promote responsible children's marketing practices.

Most important, these guidelines are a flexible, market-based approach rather than a government mandate. The Guidelines for Interactive Electronic Media state: "Just as these new media are rapidly evolving, so in all likelihood will this section of the Guidelines. Advances in technology, increased understanding of children's use of the medium, and the means by which these current guidelines are implemented will all contribute to the evolution of the 'Interactive Electronic Media' section. CARU's aim is that the Guidelines will always reflect the latest developments in technology and its application to children's advertising."

CARU monitors and reviews children's advertising in all media, including the online environment. The CARU guidelines address particular concerns, including host selling and the distinction between content and advertising. If they find advertising that is misleading, inaccurate or inconsistent with the Guidelines, CARU seeks changes through the voluntary cooperation of advertisers. In virtually every case, those changes are made.

We believe this process is working effectively in today's online environment to address the unique interests of children under 12, as they surf through commercial websites on their computers. Why should there be a different rule if a child accesses a commercial website through a television set during a children's program, rather than through a computer? ANA and AAAA strongly oppose the CME proposal to ban a direct link to a commercial website.

Finally, given the real financial challenges in developing quality children's programming, the FCC should not consider policy restrictions at this early stage of the digital transition that would create even more disincentives for such programming.

Definition of Commercial Matter

ANA and AAAA strongly oppose any effort to revise the definition of "commercial matter" to include public service announcements, messages or other program interruptions that do not currently contribute toward the commercial limits.

The various messages and announcements described in the Notice may indeed be educational and valuable for young viewers, but they are not messages that have been provided by and paid for by advertisers. Including these types of messages within the definition of "commercial matter" would further squeeze the amount of time available for commercial messages from program sponsors. We believe such a change would be a further disincentive to the economic viability of children's television programming.

Promotions During Children's Programming

The advertising community is sensitive to the nature and tone of commercials that appear during children's programming. However, ANA and AAAA are very concerned about any effort by the Commission to regulate program or product promotions that are somehow "unsuitable for children to watch." First, the FCC lacks jurisdiction to regulate advertising in this way. Second, the definition of "children's programming," if not carefully limited, could impose severe limits on programs for which most people in the audience are adults. Third, any such restrictions would raise significant First Amendment concerns.

Jurisdiction. Congress has established the Federal Trade Commission, not the FCC, as the agency with primary jurisdiction to regulate national advertising in all media. While the FCC has authority to ensure that the nation's broadcast system is operated in the public interest, we do not believe that Congress ever envisioned that this authority would or should be used as a springboard for FCC oversight of advertising content on the broadcast media.

The Liaison Agreement between the FCC and the FTC sets out the respective responsibilities of the two agencies in this arena. It states that:

> "The FTC, pursuant to its legislative authority, will exercise primary jurisdiction over all matters regulating unfair or deceptive advertising in all media, including the broadcast media;
>
> The FCC pursuant to its Congressional mandate, will continue to take into account pertinent considerations in this area in determining whether broadcast applications for license or renewal of license shall be granted or denied and in the discharge of other statutory responsibilities." (emphasis added)

The FTC, not the FCC, has the experience and the expertise to regulate advertising for all products and services in all media. Moving the FCC into the role of regulating major categories of advertising would be duplicative and would divert limited staff and resources away from the other important responsibilities of the Commission.

The two possible options outlined in the Notice represent a radical shift in government policy for broadcast advertising. Those options include: (1) requiring commercials to be rated and encoded so they can be screened by V-chip technology; and (2) requiring that commercials be rated and appear only in programs with a similar rating. These proposals, based particularly on a very subjective standard of "promotions unsuitable for children to watch," raise serious First Amendment and public policy concerns. We believe that they are beyond the legal authority of the FCC and would be inappropriate and misguided.

The Communications Act contains no specific provision that authorizes the FCC to ban or otherwise restrict advertising of programs or particular products, except for tobacco products. However, some have suggested that the "public interest" standard embodied in the Act's general licensing provisions authorizes the Commission to act in this area.

In the absence of express statutory authority, federal agencies are not free to impose limits on advertising. Government assertions as to the "unique" nature of a product and the asserted mandate to protect children do not confer statutory authority to regulate advertising where none exists. Regardless of how serious the problem an administrative agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law. *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000). The same principle controls the FCC, and the courts have limited the Commission's ability to unilaterally extend its authority over programming matters in the absence of an express statutory grant. E.g., *FCC v. Midwest Video Corporation,* 440 U.S. 689 (1979).

This is true despite the FCC's general "public interest" mandate. Although the D.C. Circuit suggested in *Banzhaf v. FCC*, 405 F.2d 1082 (1968), that the public interest required the regulation of certain product advertisements (cigarettes), the court subsequently retreated from that view. See *National Citizens Committee for Broadcasting v. FCC,* 567 F.2d 1095, 1108 (D.C. Cir. 1977) ("We think that this view is unwarranted, and realize that both the Commission and this court used stronger language than was necessary in stating that the decision in *WCBS-TV* was 'required by the public interest.'"), cert. denied, 436 U.S. 926 (1978). Indeed, the D.C. Circuit held more recently that the FCC could not impose limits on political advertising based on its generalized public interest mandate and a desire to shield children from advertisements that "may be harmful." *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

Historically, the FCC has understood the application of such statutory limits, even for products the government had designated as harmful. Thus, in a 1969 Notice of Proposed Rulemaking on tobacco advertising, the Commission stressed that the "question of an across-the-board [cigarette advertising] ban is of course one solely for the Congress." *Amendment of Part 73 of the Federal Communications Commission Rules With Regard to the Advertisement of Cigarettes*, 16 F.C.C. 2d 284, 289 (1969). The same statutory limitation on FCC action applies to regulatory measures that fall short of a ban. Thus, when the FCC abandoned its policy of requiring counter-advertising for certain product commercials more than two decades ago, it noted:

> "If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'"

The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 25 n.22 (1974) (*"Fairness Doctrine Report"*), aff'd., *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977).

Audience Definition. Any restrictions on advertising could very likely restrict a great deal of information directed to adults, depending on the Commission's definition of "children's programming." For example, in its recent report on marketing "violent media," the Federal Trade Commission's general measure of the type of advertising that constitutes "targeting" of kids was quite broad and therefore troubling. The report generally looked at "whether advertising reached an audience of 35 percent or more under 17." In other words, it concluded that children are being "targeted" even when a substantial majority of those in the audience are adults. Thus, the FTC report criticized the industry for advertising during programs popular with kids, such as *Xena: Warrior Princess* and *South Park*, even though 80 percent of the viewers of those programs are 18 or older.

ANA and AAAA are, therefore, very concerned about the undefined discussion in the Notice about "programs viewed by children" or "programs designed for children."

First Amendment Concerns. Any effort by the FCC to require commercials to be rated or encoded or restricted to placement in certain programming would place the government in the role of censor and raise very serious First Amendment issues.

In 1976, the Supreme Court abandoned what it described as a "simplistic" and "highly paternalistic" approach that enabled the government to "suppress the dissemination of concededly truthful information about entirely lawful activity" on the theory that the government knew best how to protect the health of the public. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748, 759, 769, 772 (1976).

The U.S. Supreme Court has since made it clear that truthful, nondeceptive commercial speech in any medium cannot be banned or restricted unless the restriction "directly and materially advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), a unanimous Supreme Court reaffirmed that all truthful nondeceptive advertising about a legal product is entitled to the same level of First Amendment protection. The Court noted that bans which target truthful, nonmisleading advertising rarely protect consumers from harm. Rather, they often serve only to obscure an underlying governmental policy that could be implemented without banning speech.

The Court held that the government carries the heavy burden to prove that a speech ban or restriction would directly and materially advance the government's asserted interest. The Court emphatically stated that speculation or conjecture is never enough, particularly when the government takes aim at truthful advertising for paternalistic ends.

The First Amendment implications of government regulation of these types of commercials were recently noted by the Chairman of the Federal Trade Commission. In a November 20, 2000 letter to Senate Commerce Committee Chairman John McCain (R-AZ), FTC Chairman Pitofsky outlined the significant legal obstacles to a law enforcement action against the marketing practices of the entertainment industry. He concluded: "Finally, whatever the outcome of FTC enforcement actions under these theories, it seems clear that because of the substantial First Amendment protections accorded these products, a comprehensive and effective self-regulatory response could have a more prompt and substantial impact on the problems described in the Commission's report than would FTC enforcement actions."

The advertising community certainly understands the public concern about some of the activities described in the FTC's recent report on the marketing practices of the entertainment industry. Each of the industries covered in the FTC's report has taken some positive steps to respond to these concerns. Further, there is the broad self-regulatory program of CARU to protect the interests of families and children in this area. The CARU guidelines specifically provide that "Products inappropriate for use by children should not be advertised directly to children."

ANA and AAAA believe that self-regulatory efforts by marketers and broadcasters are the best way to ensure that "unsuitable" commercials do not appear during children's programming. Any effort by the FCC to ban or regulate these promotions would almost certainly run into serious First Amendment obstacles, as described by FTC Chairman Pitofsky.

<u>The V-Chip is Not a Viable Solution to Concerns About Advertising</u>

ANA and AAAA strongly oppose the proposal to require that commercials be rated and encoded to enable blocking through V-chip technology.

The FCC has no statutory authority for such a project. Section 551(b) of the Telecommunications Act of 1996 amended Section 303 of the Communications Act, empowering the FCC to prescribe "guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, and other indecent material about which parents should be informed before it is displayed to children." Nothing in the legislation gives the FCC authority to add commercials, including advertisements for specific programs or products, to this statutory list of categories. Additionally, the law limits the FCC's role to making recommendations and does not empower the Commission to prescribe V-chip requirements.

Perhaps most importantly, any proposal to "screen out" broadcast advertising ultimately undermines the broadcasting industry. As the Supreme Court recently held in *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), preserving free over-the-air local television is a government purpose of substantial importance. Moreover, phenomena that erode the advertising base of broadcast stations pose a significant threat to the viability of the broadcast medium. *Id.* at 208-209.

Significantly, the erosion of advertising revenue was one reason the FCC abandoned the counter-advertising policy for product advertising. *Fairness Doctrine Report*, 48 F.C.C.2d at 26-27. See *National Citizens Committee for Broadcasting,* 567 F.2d at 1110 ("the Commission suggested in the *Fairness Report* . . . that application of the fairness doctrine to commercial advertisements could undermine the economic base of commercial broadcasting").

A V-chip for advertisements, whether applied to a particular product category or to advertising in general, would obviously have the same effect.

Conclusion

The Commission's Notice raises a number of important issues regarding the transition from analog to digital broadcasting. We believe it would be premature and counterproductive for the FCC to adopt rigid rules about commercial limits at this stage of the process. Further, we strongly oppose any effort to revise the definition of "commercial matter" to include various messages that are not paid for by program sponsors. Finally, our associations strongly oppose any FCC efforts that would place the government in the role of rating commercials or restricting the placement of those commercials in certain programming. We believe that the legitimate concerns about the content of commercials that appear during children's programming can be best addressed through various self-regulatory programs such as CARU and the recently announced efforts of the entertainment industry.

As the Commission knows, there are significant financial challenges in developing quality children's programming. The proposals discussed above, if adopted, could create significant disincentives for such programming.

Thank you for your consideration of our views.

Sincerely,

Dan Jaffe

Daniel L. Jaffe
Executive Vice President, ANA

Harold Shoup

Harold A. Shoup
Executive Vice President, AAAA

c: John J. Sarsen, Jr., ANA
Children/FCC Digital NPRM 2000